

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of : W. A. H. Berkvens
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**APPEAL BRIEF
On Appeal from Group Art Unit 2151**

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I. REAL PARTY IN INTEREST

The real party in interest is Koninklijke Philips Electronics N.V., the assignee of record.

II. RELATED APPEALS AND INTERFERENCES

Appellant is not aware of any pending appeals, judicial proceedings, or interferences which may be related to, directly affect, be directly affected by, or have a bearing on the Board's decision in the pending appeal.

III. STATUS OF CLAIMS

- a) Claims 1 – 10 are pending. Claims 1 and 8 – 10 being independent.
- b) Claims 1 – 10 stand rejected and are the subject of this appeal.

IV. STATUS OF AMENDMENTS

The claims listed in section “VIII. Claims Appendix” of this Appeal Brief correspond to the claims submitted in Appellant's response of March 13, 2008. No claim amendments have been submitted following Appellant's response of March 13, 2008. Nor are any amendments pending.

V. SUMMARY OF CLAIMED SUBJECT MATTER

The claimed invention, as recited in claim 1, is directed to a system for distributing a content, the system comprising: a receiver for receiving the content (page 3, line 8; Fig. 1, 102), the receiver comprising: a selector for selecting a distributor of the content out of a plurality of distributors (page 3, lines 15 – 16; Fig. 1, 104); content-requesting means for requesting the content from the distributor selected (page 3, lines 24 – 25; Fig. 1, 105); receiving means for receiving the content (page 3, line 25; Fig. 1, 106); identity-determining means for determining an identity associated with the content (page 4, lines 7 – 8; Fig. 1, 107); and a verifier for verifying an availability of the content at the distributor based on the identity determined (page 5, lines 9 – 10; Fig. 1, 109), the distributor of the content (page 3, lines 8 – 9; Fig. 1, 103), comprising: content request-receiving means for receiving a request for the content (page 3, lines 30 – 31; Fig. 1, 110); and a dispatcher for dispatching the content (page 3, line 31; Fig. 1, 111), wherein the distributor is arranged to dispatch the content to the receiver in response to receiving a request for the content from the receiver (page 4, lines 1 – 2), and wherein the receiver is arranged to only select the distributor if the verifier verified the availability of the content at the distributor (page 5, lines 15 – 16).

The claimed invention, as recited in claim 8 is directed to a receiver for receiving a content (page 3, line 8; Fig. 1, 102), comprising: a selector for selecting a distributor of the content out of a plurality of distributors (page 3, lines 15 – 16; Fig. 1, 104); content-requesting means for requesting the content from the distributor selected (page 3, lines 24 – 25; Fig. 1, 105); receiving means for receiving the content (page 3, line 25; Fig. 1, 106); identity-determining means for determining an identity associated with the content (page 4, lines 7 – 8; Fig. 1, 107); and a verifier for verifying an availability of the content at the distributor based on the identity

determined (page 5, lines 9 – 10; Fig. 1, 109), and wherein the receiver is arranged to only select the distributor if the verifier verified the availability of the content at the distributor (page 5, lines 15 – 16).

The claimed invention, as recited in claim 9 is directed to a method of distributing a content, comprising: selecting, by a receiver (page 3, line 8; Fig. 1, 102), a distributor of the content out of a plurality of distributors (page 3, lines 15 – 16; Fig. 1, 104), requesting, by the receiver, the content from the distributor selected (page 3, lines 24 – 25; Fig. 1, 105), dispatching the content to the receiver in response to receiving the request for the content from the receiver (page 3, lines 30 – 31; Fig. 1, 110 and 111), receiving the content at the receiver (page 3, line 25; Fig. 1, 106), determining an identity associated with the content (page 4, lines 7 – 8; Fig. 1, 107), and verifying an availability of the content at the distributor based on the identity determined (page 5, lines 9 – 10; Fig. 1, 109), and wherein, in the step of selecting, the distributor is only selected if the verifier verified the availability of the content at the distributor (page 5, lines 15 – 16).

The claimed invention, as recited in claim 10 is directed to a computer program product enabling a receiver (page 3, line 8; Fig. 1, 102) that is part of a system for distributing a content to select a distributor of the content out of a plurality of distributors (page 3, lines 15 – 16; Fig. 1, 104), to request and receive the content from the distributor selected (lines 24 – 25; Fig. 1, 105 and 106), to determine an identity associated with the content (page 4, lines 7 – 8; Fig. 1, 107), to verify an availability of the content at the distributor based on the identity determined (page 5, lines 9 – 10; Fig. 1, 109), and to only select the distributor after verifying the availability of the content at the distributor (page 5, lines 15 – 16).

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

- A. Whether claims 1 – 4, 6 and 8 – 10 are properly rejected under 35 U.S.C. § 102(b) as being anticipated by Legout et al. (EP 1322094 A1), hereinafter “Legout.”
- B. Whether claims 5 and 7 are properly rejected under 35 U.S.C. § 103(a) as being unpatentable over Legout in view of Kaufman et al. (WO 0191417 A2), hereinafter “Kaufman.”

VII. ARGUMENT

Appellant respectfully traverses the rejections in accordance with the detailed arguments set forth below.

A. Claims 1 – 4, 6 and 8 – 10 are not properly rejected under 35 U.S.C. § 102(b) as being anticipated by Legout.

1. Claim 1

In order for a reference to anticipate a claim the MPEP 2131 requires the reference to teach each and every element of that claim. It is respectfully submitted that the Examiner failed to establish a prima facie case of anticipation.

Appellant’s claim 1, in part, requires:

“a receiver for receiving the content, the receiver comprising:

a selector for selecting a distributor of the content out of a plurality of distributors;

content-requesting means for requesting the content from the distributor selected;

receiving means for receiving the content;

identity-determining means for determining an identity associated with the content; and

a verifier for verifying an availability of the content at the distributor based on the identity determined.”

In the June 6, 2008 Office Action, page 12, the Examiner stated that Legout discloses a client ([0028], lines 26 – 30), and interpreted the claimed receiver as a client, arguing that a client is an application or system that obtains results. The Examiner further alleged that the client may include the features of a selector ([0004], lines 45 – 48) for selecting a distributor of the content out of a plurality of distributors ([0004], lines 45 – 48, 41 – 13) since there is a process for selecting a server in a network having at least two servers; identity-determining means for determining an identity associated with the content since “the database holds for all surrogate servers the stored content identifiers” ([0069], lines 9 – 11); and a verifier for verifying an availability of the content at the distributor based on the identity determined since “the process verifies that the requested content is actually accessible” from a server ([0068], lines 1 – 8). Appellant respectfully disagrees with the interpretation that the claimed receiver is the client disclosed in Legout. Appellant further respectfully submits that the client of Legout is improperly used by the Examiner as a catch-all element to fill in the feature gaps between Legout and the claimed invention.

Appellant submits that an element classified as a “client” does not necessary mean that it is an application or system that obtains results. For example, a client that requests a server to delete an entry in a database does not need to receive any contents from the database or the server. Appellant submits that there is no basis in Legout that supports the interpretation that the claimed receiver is a client disclosed in Legout. The interpretation of the term “client” as the claimed receiver is beyond what Legout set forth in its specification. In *Vitronics*, 90 F.3d, 1582, the courts stated that the specification is “the single best guide to the meaning of a disputed

term.” Appellant submits that the specification of Legout does not support the Examiner’s interpretation. For example, Legout, paragraph [0028], recites:

“The invention proposes a method for selecting a surrogate server, in a content delivery network. It is intended to select the “optimal” surrogate server for the requested resource, for a request from a given user (or client). The word “optimal” reflects the capacity of the CDN to provide the requested resource to the user, as fast and as conveniently as possible for the user and, in the case of streams, as uninterrupted as possible.”

It is clear from the above passage that the role of the client in Legout is equivalent to that of a user who sends requests, because Legout introduces the “client” inside a pair of parenthesis as an alternative to the user. Appellant respectfully submits that there is nothing in the specification of Legout that supports the interpretation that the claimed receiver is equivalent to the client of Legout.

Appellant further submits that the client of Legout does not provide any features even comparable to Appellant’s claimed selector for selecting a distributor of the content out of a plurality of distributors; identity-determining means for determining an identity associated with the content; and a verifier for verifying an availability of the content at the distributor based on the identity determined.

In the Office Action, page 12, the Examiner alleged that the client may include the feature of a selector ([0004], lines 45 – 48) for selecting a distributor of the content out of a plurality of distributors ([0004], lines 45 – 48, 41 – 13). However, Legout, paragraph [0004] recites:

“The main difference between known CDN techniques is their mechanism to choose the surrogate server that serves the resource. US-B-6 185

598 suggests providing reflector mechanisms for intercepting resource requests made by clients and selectively reflecting the requests to repeaters. The reflectors select a best repeater from a set of possible repeaters and redirect the client to the selected best repeater. The client then makes the request to the selected best repeater. For selecting the best repeater, the network is partitioned into cost groups; according to the user, a set of "low cost" repeaters is selected, and one repeater is selected at random among the set. If the requested resource is not in the selected repeater, the repeater copies it from the origin server, and saves a local copy of the resource in order to serve subsequent requests." (Emphasis added)

It is clear from the above passage that the selection is not made by the client, rather, the selection is made by the reflectors because the reflectors select a best repeater from a set of possible repeaters and redirect the client to the selected best repeater. Therefore, contrary to the assertion made by the Examiner, the client of Legout does not contain a feature of selector for selecting a distributor of the content out of a plurality of distributors as claimed.

In the Office Action, page 12, the Examiner also alleged that the client may include the feature of identity-determining means for determining an identity associated with the content since "the database holds for all surrogate servers the stored content identifiers" ([0069], lines 9 – 11). However, since "the database holds for all surrogate servers the stored content identifiers" therefore, it is the database, not the client, that includes the identity-determining means.

In the Office Action, page 12, the Examiner further alleged that the client may include the feature of a verifier for verifying an availability of the content at the distributor based on the identity determined since "the process verifies that the requested content is actually accessible" from a server ([0068], lines 1 – 8). However, nothing in Legout teaches or suggests that the process is performed by the client. Furthermore, Legout clearly suggests that the process of

selecting a surrogate server is not performed by a client. For example, Legout, paragraph [0010], recites:

“In view of this prior art, there is a need for a method for selecting in a content delivery network, the “best” surrogate server for serving requests to users. Such a method should be fast, easy to implement; preferably, it should not necessitate additional software or hardware at the client’s side or additional hardware within the network. The method should serve the users as rapidly as possible, and should not cause unnecessary latency.” (Emphasis added)

Clearly from the above passage, Legout does not intend the client to play any bigger role other than that of a user because Legout discloses that it should not necessitate additional software or hardware at the client’s side. This strongly suggests that Legout does not intend that the client to be a catch-all element to serve as a receiver, selector, identity means and verifier.

Although the Examiner has argued that a client is an application or system that obtains results, Appellant has demonstrated that there is no basis in Legout to extend the role of the client as alleged by the Examiner. It is clear from Legout that the role of the client (paragraph [0028]) is intended to be equivalent to that of a user. Therefore, Legout does not teach or suggest a receiver for receiving the content, the receiver comprising: a selector for selecting a distributor of the content out of a plurality of distributors; content-requesting means for requesting the content from the distributor selected; receiving means for receiving the content; identity-determining means for determining an identity associated with the content; and a verifier for verifying an availability of the content at the distributor based on the identity determined, as claimed.

According to the binding case law established by U.S. Court of Appeals for the Federal Circuit and its predecessor Court (as interpreted in Section 2131 of the MPEP), to anticipate a

claim, the reference must teach each and every element of that claim. As discussed above, Legout is woefully deficient in teaching each and every element of Appellant's claim 1. It is, therefore, respectfully submitted that independent claim 1 is patentable over Legout and the rejection should be reversed.

2. Independent claim 8

Appellant's independent claim 8 is directed to a receiver for receiving content, comprising:

a selector for selecting a distributor of the content out of a plurality of distributors;
content-requesting means for requesting the content from the distributor selected;
receiving means for receiving the content;
identity-determining means for determining an identity associated with the content; and
a verifier for verifying an availability of the content at the distributor based on the identity determined,
and wherein the receiver is arranged to only select the distributor if the verifier verified the availability of the content at the distributor.

As pointed out above in the discussion of claim 1 and for similar reasons, Legout fails to disclose a receiver comprising a selector for selecting a distributor of the content out of a plurality of distributors; content-requesting means for requesting the content from the distributor selected; receiving means for receiving the content; identity-determining means for determining an identity associated with the content; and a verifier for verifying an availability of the content at the distributor based on the identity determined, and wherein the receiver is arranged to only select the distributor if the verifier verified the availability of the content at the distributor.

Appellant essentially repeats the above arguments from claim 1 pointing out why independent

claim 8 is not anticipated by Legout. Thus, for at least the foregoing reasons, Appellant respectfully submits that claim 8 is patentable over Legout and the rejection should be reversed.

3. Independent claim 9

Appellant's independent claim 9 is directed to a method of distributing content, comprising:

selecting, by a receiver, a distributor of the content out of a plurality of distributors,

requesting, by the receiver, the content from the distributor selected,

dispatching the content to the receiver in response to receiving the request for the content from the receiver,

receiving the content at the receiver,

determining an identity associated with the content, and

verifying an availability of the content at the distributor based on the identity determined,

and wherein, in the step of selecting, the distributor is only selected if the verifier verified the availability of the content at the distributor.

As pointed out above in the discussion of claim 1 and for similar reasons, Legout fails to disclose a method of distributing content, comprising: selecting, by a receiver, a distributor of the content out of a plurality of distributors, requesting, by the receiver, the content from the distributor selected, dispatching the content to the receiver in response to receiving the request for the content from the receiver, receiving the content at the receiver, determining an identity associated with the content, and verifying an availability of the content at the distributor based on the identity determined, and wherein, in the step of selecting, the distributor is only selected if the verifier verified the availability of the content at the distributor. Appellant essentially repeats the above arguments from claim 1 pointing out why independent claim 9 is not anticipated by

Legout. Thus, for at least the foregoing reasons, Appellant respectfully submits that claim 9 is patentable over Legout and the rejection should be reversed.

4. Independent claim 10

Appellant's independent claim 10 is directed to a computer program product enabling a receiver that is part of a system for

distributing a content to select a distributor of the content out of a plurality of distributors, to request and receive the content from the distributor selected, to determine an identity associated with the content, to verify an availability of the content at the distributor based on the identity determined, and to only select the distributor after verifying the availability of the content at the distributor.

As pointed out above in the discussion of claim 1 and for similar reasons, Legout fails to disclose a computer program product enabling a receiver that is part of a system for distributing a content to select a distributor of the content out of a plurality of distributors, to request and receive the content from the distributor selected, to determine an identity associated with the content, to verify an availability of the content at the distributor based on the identity determined, and to only select the distributor after verifying the availability of the content at the distributor. Appellant essentially repeats the above arguments from claim 1 pointing out why independent claim 10 is not anticipated by Legout. Thus, for at least the foregoing reasons, Appellant respectfully submits that claim 10 is patentable over Legout and the rejection should be reversed.

5. Claims 2 – 4 and 6

Claims 2 – 4 and 6 depend from claim 1 and include all the distinguishing features as discussed above with respect to claim 1. Accordingly, since Legout fails to teach each and every feature of claim 1, dependent claims 2 – 4 and 6 are also allowable by virtue of their dependency, as well as the additional subject matter recited therein and the rejections should be reversed.

B. Claims 5 and 7 are not properly rejected under 35 U.S.C. §103(a) as being unpatentable over Legout in view of Kaufman.

It is respectfully submitted that the Examiner has failed to establish a prima facie case of obviousness. The test for determining if a claim is rendered obvious by one or more references for purposes of a rejection under 35 U.S.C. 103 is set forth in MPEP § 706.02(j):

“To support the conclusion that the claimed invention is directed to obvious subject matter, either the references must expressly or impliedly suggest the claimed invention or the examiner must present a convincing line of reasoning as to why the artisan would have found the claimed invention to have been obvious in light of the teachings of the references.”
Ex parte Clapp, 227 USPQ 972, 973 (Bd. Pat. App. & Inter. 1985).

If the above-identified criteria are not met, then the cited reference(s) fails to render obvious the claimed invention and, thus, the claimed invention as recited in claims 5 and 7 is distinguishable over the cited references and the rejections should be reversed.

1. Claims 5 and 7

Claims 5 and 7 depend from claim 1 and includes all the distinguishing features as discussed above with respect to claim 1. The Examiner apparently only relies on the secondary reference Kaufman for teaching the additional features recited in the dependent claims and does not allege that Kaufman teaches the features of claim 1, which Legout was relied upon as teaching. To avoid repetition, the dependent claims will not be discussed in detail with the understanding that they are patentable at least for the same reasons as discussed above.

Accordingly, since Kaufman fails to cure the deficiencies in Legout with respect to features in claim 1, dependent claims 5 and 7 are also allowable by virtue of their dependency, as well as the additional subject matter recited therein and the rejections should be reversed.

CONCLUSION

In light of the above, Appellant respectfully submits that the rejections of claims 1 – 10 are in error, legally and factually, and must be reversed.

Respectfully submitted,

Date: November 3, 2008

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VIII. CLAIMS APPENDIX

1. (Previously presented) A system for distributing a content, the system comprising:
 - a receiver for receiving the content, the receiver comprising:
 - a selector for selecting a distributor of the content out of a plurality of distributors;
 - content-requesting means for requesting the content from the distributor selected;
 - receiving means for receiving the content;
 - identity-determining means for determining an identity associated with the content; and
 - a verifier for verifying an availability of the content at the distributor based on the identity determined,
 - the distributor of the content, comprising:
 - content request-receiving means for receiving a request for the content; and
 - a dispatcher for dispatching the content,
 - wherein the distributor is arranged to dispatch the content to the receiver in response to receiving a request for the content from the receiver, and wherein the receiver is arranged to only select the distributor if the verifier verified the availability of the content at the distributor.
2. (Previously presented) A system as claimed in claim 1, wherein the receiver comprises identity-receiving means and wherein the receiver is arranged to determine an identity by receiving the identity from one out of the plurality of distributors.

3. (Previously presented) A system as claimed in claim 2,

wherein the receiver comprises identity-requesting means, wherein the receiver is arranged to receive the identity after requesting the identity of the content from the distributor,

wherein the distributor comprises: identity request-receiving means for receiving a request for the identity of the content; an identity dispatcher for dispatching the identity, and

wherein the distributor is arranged to dispatch the identity to the receiver in response to receiving a request for the identity of the content from the receiver.

4. (Previously presented) A system as claimed in claim 2, wherein the system comprises a further distributor, wherein the receiver is arranged to receive a further identity from the further distributor, wherein the verifier comprises a comparator for comparing the identity associated with the content with the further identity received, wherein the verifier is arranged to verify the availability of the content at the further distributor if the identity equals the further identity, and wherein the receiver is arranged to only select the further distributor if the verifier verified the availability of the content at the further distributor.

5. (Previously presented) A system as claimed in claim 4, wherein the receiver comprises quality-determining means for determining a quality of receiving the content of the distributor, and wherein the receiver is arranged to select the further distributor in dependence upon the quality determined.

6. (Previously presented) A system as claimed in claim 2, wherein the receiver comprises identity-deriving means, and wherein the receiver is arranged to derive the identity from content received from one out of the plurality of distributors.

7. (Previously presented) A system as claimed in claim 2, wherein the system comprises a further distributor, wherein the further distributor comprises:

verification request-receiving means for receiving a verification request for verifying availability at the further distributor of content associated with a further identity, the further identity being part of the verification request; and

a verification result dispatcher for dispatching a verification result,

wherein the further distributor is arranged to, in response to receiving the verification request from the receiver, the further distributor is arranged to verify availability at the further distributor of content associated with the further identity and to dispatch the verification result to the receiver, and wherein the receiver is arranged to only select the further distributor after dispatching a verification request to the further distributor and receiving a verification result that verifies the availability of the content at the further distributor.

8. (Previously presented) A receiver for receiving a content, comprising:

a selector for selecting a distributor of the content out of a plurality of distributors;

content-requesting means for requesting the content from the distributor selected;

receiving means for receiving the content;

identity-determining means for determining an identity associated with the content;

and

a verifier for verifying an availability of the content at the distributor based on the identity determined,

and wherein the receiver is arranged to only select the distributor if the verifier verified the availability of the content at the distributor.

9. (Previously presented) A method of distributing a content, comprising:

selecting, by a receiver, a distributor of the content out of a plurality of distributors,
requesting, by the receiver, the content from the distributor selected,
dispatching the content to the receiver in response to receiving the request for the content from the receiver,

receiving the content at the receiver,
determining an identity associated with the content, and
verifying an availability of the content at the distributor based on the identity determined,

and wherein, in the step of selecting, the distributor is only selected if the verifier verified the availability of the content at the distributor.

10. (Previously presented) A computer program product enabling a receiver that is part of a system for distributing a content to select a distributor of the content out of a plurality of distributors, to request and receive the content from the distributor selected, to determine an identity associated with the content, to verify an availability of the content at the distributor based on the identity determined, and to only select the distributor after verifying the availability of the content at the distributor.

IX. EVIDENCE APPENDIX

No evidence has been submitted pursuant to §§ 1.130, 1.131, or 1.132 of this title nor any other evidence entered by the examiner and relied upon by appellant in the appeal.

X. RELATED PROCEEDINGS APPENDIX

Appellant is not aware of any appeals or interferences related to the present application.